

1 Motion to strike defendants answer as untimely.

2 1. Plaintiff is: Enid Futterman, 661 Route 23, Craryville NY 12521, and defendant is:  
3 Principal Bank

4 2. On August 18, 2010 plaintiff sued defendant for breach of fiduciary duty, fraud, fraud  
5 by nondisclosure, and violations of various consumer protection laws.

6 3. On August 18, 2010 plaintiff filed with the court an ORIGINAL COMPLAINT. On  
7 August 24, 2010 defendant was served with a summons and a copy of plaintiff's complaint by  
8 and through Iowa Process Service. A copy of the return of service is attached as Exhibit A.  
9 Defendant did not file a responsive pleading or otherwise defend the suit.

10 4. Plaintiff, 9/15/2010 entered into the court a Petition For No Answer Default, with Proof  
11 of Service Attached.

12 5. On 9/16/2010 Defendant filed a response to the suit, which, according to the rules of  
13 Federal Proceedure are untimely.

14 B. Argument

15 5. The court clerk may enter a default against a party who has not filed a responsive  
16 pleading or otherwise defended the suit. Fed. R. Civ. P. 55(a); *see United States v. \$23,000 in*  
17 *U.S. Currency*, 356 F.3d 157, 163 (1st Cir. 2004); *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 141  
18 (5th Cir. 1996); *United States v. 51 Pieces of Real Prop. Roswell, N.M.*, 17 F.3d 1306, 1314  
19 (10th Cir. 1994). In this instant case, the clerk , nor any officer of the court has ruled upon the  
20 no answer deafault.

21 6. The clerk should enter a default against defendant because defendant did not file an  
22 answer within 21 days after August 24, 2010 the date of service. Fed. R. Civ. P. 12(a)(1)(A)(i).

23 7. Plaintiff met the procedural requirements for obtaining an entry of default from the  
24 clerk as demonstrated by Linda Dugan's sworn affidavit, attached as Exhibit A in Plaintiffs  
25 Petition For No Answer Default. Said affidavit establishes by sworn testimony of Plaintiff that  
26 Defendant failed to answer or otherwise defend the instant action within the 20 day time period  
27 allowed by law.

28 8. Defendant is not a minor or an incompetent person. *See* Fed. R. Civ. P. 55(b)(1).

29 9. Defendant is not in military service. *See* 50 U.S.C. app. §521(b)(2). An affidavit of  
30 defendant's military status is attached as Exhibit A.

31 10. Because defendant did not file a responsive pleading or otherwise defend the suit,  
32 defendant is not entitled to notice of entry of default. *Haw. Carpenters' Trust Funds v. Stone*,  
33 794 F.2d 508, 512 (9th Cir. 1986); *see* Fed. R. Civ. P. 55(a).

34 11. Defendant uses the term excusable neglect for reason why the default should be  
35 overturned. Defendant made no attempts to contact the Plaintiff in a timely fashion after they  
36 discovered their fault. Now, instead of asking the Plaintiff for an opportunity to extend the time  
37 to answer, they are now, after the necessary days to respond, begging the court for an extension,  
38 for improperly understanding court rules of civil procedure. It is obvious that this firm lacks the  
39 systems necessary to prevent errors. Plaintiff objects to any extension granted.

40 C. Conclusion

41 12. Plaintiff filed a suit against defendant in the court on the 18<sup>th</sup> day of August, 2010.  
42 Defendant failed to timely answer or otherwise defend said action and, thereby, Plaintiff is  
43 entitled to judgment against defendant is all things requested by Plaintiff in the suit. For these  
44 reasons, plaintiff asks the clerk to enter a default in favor of plaintiff.

45 **Respectfully Submitted,**

46   
47 \_\_\_\_\_  
48 **Enid Futterman**

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Exhibit A

U.S. DISTRICT COURT  
N.D. OF N.Y.  
FILED

AO 440 (Rev. 04/08) Civil Summons (Page 2)

SEP 15 2010

**Proof of Service**

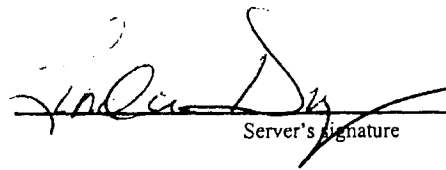
LAWRENCE K. BAERMAN, CLERK  
ALBANY

I declare under penalty of perjury that I served the summons and complaint in this case on 8/24/2010 at 12:45 pm by:

- (1) personally delivering a copy of each to the individual at this place, \_\_\_\_\_; or
- (2) leaving a copy of each at the individual's dwelling or usual place of abode with \_\_\_\_\_ who resides there and is of suitable age and discretion; or
- (3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is Ann Smalley, Sr. Compliance Analyst, Principal Bank; or
- (4) returning the summons unexecuted to the court clerk on \_\_\_\_\_; or
- (5) other (specify) \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 1/11.

Date: 8/25/2010

  
\_\_\_\_\_  
Server's signature

Linda Dugan, Process Server  
Printed name and title

Ind. Contractor for Iowa Process Service  
541 31st Street  
Des Moines, IA 50312  
(877)816-4696

\_\_\_\_\_  
Server's address

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**Iowa Process Service**  
 541 31st Street, Des Moines, IA 50312  
 Phone: 877-816-4696 Fax: 877-818-9844  
 Email: info@iowaserveprocess.com  
**Field Sheet & Receipt**

Assigned To: Linda Dugan

**Serve To:** Principal Bank**Address:** 6200 Park Avenue, Des Moines, IA 50321-1270**JOB ID:** 10-003581**Priority:** Routine

**Spec. Instrns:** Please serve any authorized person on behalf of Principal Bank. Make sure to get name and title and physical description of person served since this is a NY case.

**Case Number:** 1:10-CV-1001**Document(s):** Summons in a Civil Action; Original Petition**SERVICE ATTEMPTS****Date / Time****Remarks**

- 1.) \_\_\_\_\_
- 2.) \_\_\_\_\_
- 3.) \_\_\_\_\_
- 4.) \_\_\_\_\_

**Service Type:** **Personal** **Substitute** **Corporate** **Non-Service** **Posted**

**Actual Service Date:** 8-24 2010 @ 12:45 AM ☒ PM Additional Address: 1 2 3

**Person Served:** Ann Smalley **Relationship:** BANK ANALYST

**Race:** W **Sex:** M ☒ F **Age:** 34 **Ht.:** 5 **Wt:** 6" **Hair:** BL **Glasses:** Y ☒ N

**COMMENTS:** SHORT HAIR / BOB HAIR CUT

I acknowledge receipt of the documents listed above:

Ann Smalley


Ann Smalley

Signature Of Recipient

Sr. Compliance Analyst, Principal Bank

## CERTIFICATE OF SERVICE

I, Enid Futterman, do swear and affirm that I have served a signed copy of this Motion To Strike Defendants Answer As Untimely, to any and all defendants by way of U.S.P.S. Certified mail # and return receipt 7007 1490 0004 9333 2440, Regular Mail, and via Facsimile to #973 425 0161.

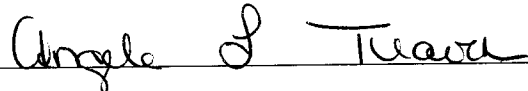
  
Enid Futterman  
661 Route 23  
Craryville NY 12521

The Person above, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to this document and acknowledged to me that he/she executed the same in his authorized capacity and that by his signature on this instrument who is the person who executed this instrument.

I certify under PENALTY OF PERJURY under the laws of the State of New York that the foregoing paragraph is true and correct.

Witness my hand and official seal.

Angela L. Traver  
 Notary Public, State of New York  
 Qualified in Columbia County  
 No. 01TR6093508  
 Commission Expires on 6/2/11



NOTARY PUBLIC IN AND FOR  
 THE STATE OF NEW YORK

Notary Seal

## INDIVIDUAL ACKNOWLEDGMENT

STATE OF NEW YORK )  
 ) SS.:  
 COUNTY OF Columbia

On this 2nd day of October in the year 2010.

before me personally came Enid Futterman  
 to me known to be the person described in and who executed the foregoing instrument,  
 and acknowledged to me that (s)he executed the same.

  
 NOTARY PUBLIC